

EXHIBIT 2

Page 1

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF MASSACHUSETTS

3 ----->
4 VANTAGE FINANCIAL SERVICES, :
5 INC., :

6 Plaintiff, :
7 : CASE NO.: 04-11686-WGY
8 vs

9 NONPROFIT SERVICE GROUP and :
10 GEORGE MILLER, :

11 Defendants. :
12 ----->

13 DEPOSITION OF: JAY FLEISHER, ESQUIRE
14 TAKEN: Pursuant to Notice by
15 Counsel for Plaintiff

16 DATE: October 28, 2005

17 PLACE: Shriners Hospital
18 2900 Rocky Point Drive
19 Tampa, Florida

20 TIME: 9:32 a.m. to 4:12 p.m.

21 REPORTED BY: Shelly Noriega, RPR
22 Notary Public
23 State of Florida at Large

24 Pages 1 - 127
25

Page 3

INDEX

1	PAGE
2 Examination by Mr. Johnson.....	5
3 Examination by Mr. Griffin.....	81
4 Certificate of Reporter.....	125
5 Errata Sheet.....	126
6 Read and Sign Letter.....	127

INDEX OF EXHIBITS

9	NUMBER	PAGE
10	1 Memo.....	12
11	2 Agreement.....	26
12	3 Letter.....	29
13	4 E-mail.....	31
14	5 Handwritten notes.....	41
15	6 Agreement.....	74
16	7 Memo.....	77
17	8 Memo.....	78
18	9 Letter.....	81
19	10 Memo.....	85
20	11 Memo.....	87
21	12 Memo.....	97
22	13 Indemnity Agreement.....	102
23	14 Letter.....	105
24	15 Affidavit.....	107
25	16 Fax/Letter.....	111

Page 2

1 APPEARANCES:

2
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9 Appeared on behalf of Plaintiff

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Appeared on behalf of Shriners Hospital

Page 4

INDEX CONTINUED
PAGE

1	
2	
3	17 Handwritten notes.....112
4	18 Letter.....114
5	19 Letter.....120

(Exhibits retained by Mr. Johnson.)

Page 5

1 The deposition of JAY FLEISHER, ESQUIRE, taken
2 pursuant to notice by counsel for the Plaintiff, on
3 October 28, 2005, commencing at 9:32 a.m., at Shriners
4 Hospital, 2900 Rocky Point Drive, Tampa, Florida, before
5 Shelly Noriega, RPR, Notary Public, State of Florida at
6 Large.

7 JAY FLEISHER, ESQUIRE
8 having been duly sworn to tell the truth, the whole
9 truth, and nothing but the truth, was examined and
10 testified as follows:

11 EXAMINATION

12 BY MR. JOHNSON:

13 Q Good morning, Mr. Fleisher. Would you identify
14 yourself for the record.

15 A Yes. My name is Jay Fleisher.

16 Q Where do you live, sir?

17 A My residence is 4810 West Juno, J-U-N-O, Street
18 in Tampa, Florida 33629.

19 Q By whom are you employed?

20 A Shriners Hospitals for Children.

21 Q In what capacity?

22 A Managing attorney.

23 Q For how long have you held that position with
24 Shriners Hospitals for Children?

25 A Approximately six years.

Page 7

1 and assuming the managing attorney position in March of
2 1999.

3 Q Prior to the dealings between Shriners
4 Hospitals for Children and Vantage, which are at issue in
5 this proceeding, had you had any occasion to become
6 involved in contractual dealings between Shriners and
7 Professional Fundraising Counsel?

8 A No, sir.

9 Q Okay. Prior to the matters at issue in this
10 case, had you had any occasion to become knowledgeable
11 about whatever legal requirements may have at the time
12 been applicable to arrangements between nonprofit
13 organizations and Professional Fundraising Counsel?

14 MR. GRIFFIN: Objection. You may answer.

15 A Not prior to the situation you're talking
16 about.

17 BY MR. JOHNSON:

18 Q Shriners Hospitals for Children is, I take it,
19 a nonprofit organization?

20 A Yes.

21 Q Is it a 501(c)(3) organization?

22 A Yes.

23 Q Now, I take it that Shriners Hospitals for
24 Children had not previous to the Vantage matter ever
25 engaged the services of Professional Fundraising Counsel?

Page 6

1 Q Could you give me just a brief chronological
2 summary of your formal education post high school?

3 A I went to undergraduate at Columbia University
4 in New York City and then law school at the University of
5 Florida in Gainesville.

6 Q Could you just give me the years of your
7 degrees, please?

8 A Pardon?

9 Q The years that you received your degrees.

10 A I got the degree from Columbia in 1970 and the
11 degree from the University of Florida in 1977.

12 Q And will you give me a brief chronological
13 summary of your employment prior to coming to Shriners
14 Hospitals for Children six years ago?

15 A Let's see. When I got out of Columbia in 1970,
16 I joined the Naval Air Force from 1970 to -- through 1975
17 and then went from the Naval Air Force in 1975 through
18 law school. Graduated law school in 1977, went to work
19 for a law firm in Gainesville, Florida, which ultimately
20 became Brooten, B-R-O-O-T-E-N, & Fleisher. That was
21 until approximately September of 1980.

22 And then I joined the staff of the Shriners
23 Hospitals for Children, Office of the General
24 Counsel -- that's what it was called at that time -- in
25 1980, November. And I have been an attorney since 1980

Page 8

1 A Not to my knowledge.

2 Q Okay. Incidentally I take it that -- well, is
3 there another organization that also has the Shriners
4 name and which is related to the Shriners Hospitals for
5 Children?

6 MR. GRIFFIN: Objection.

7 A There is no organization exactly with the
8 Shriners name.

9 BY MR. JOHNSON:

10 Q Well, what is the relationship, if any, between
11 Shriners Hospitals for Children and the -- I'm not sure
12 what the correct name of it is. The paper's here if we
13 check and find it. But the fraternal organization.

14 A The fraternal --

15 Q Sometimes referred to as the Shriners?

16 A The fraternal relationship between -- they
17 share space in this building but the fraternal
18 organization pays rent to the hospital organization.
19 There are a certain number of positions on the boards of
20 directors of the two organizations which are occupied by
21 the same individuals.

22 Q What's the name of the fraternal organization?

23 A It's The, with a capital T, Imperial Council,
24 C-I-L, of the Ancient Arabic Order of the Nobles of the
25 Mystic Shrine for North America.

Page 9

1 Q Thank you. Now I know why I didn't have it in
2 my mind. Now, as I understand it you have always been in
3 the -- since you went to work for the Shriners Hospitals
4 for Children in November of 1980 you've always been
5 involved with the hospital organization, not the
6 fraternal organization?

7 A That's correct.

8 Q Have you ever had occasion to do any legal work
9 or render any legal services for the fraternal
10 organization?

11 A On rare, rare occasions.

12 Q In connection with whatever work you may have
13 done on rare occasions for the fraternal organization,
14 has that ever involved any dealings between the fraternal
15 organization and Professional Fundraising Counsel? I'm
16 missing you, let me try again.

17 A I'm trying to -- I don't know.

18 Q In connection with -- I think you told me that
19 you had -- that Shriners Hospitals for Children had
20 never, prior to Vantage, had dealings with Professional
21 Fundraising Counsel.

22 My question is in whatever you may have done
23 from time to time for the fraternal organization, did any
24 of that ever include any dealings between the fraternal
25 organization and any Professional Fundraising Counsel?

Page 10

1 A The fraternal organization, I believe, entered
2 into a contract with Vantage which predated my position.
3 I was not involved in that whatsoever.

4 Q Okay. So you weren't involved in any prior
5 dealings between the fraternal organization and Vantage
6 or between the fraternal organization and any other
7 Professional Fundraising Counsel?

8 A Prior to what?

9 Q Prior to your involvement in the Shriners
10 Hospitals for Children/Vantage contract which underlies
11 the matters at issue in this case?

12 A That's correct.

13 Q Okay. Thank you. Now, when did you first
14 become involved in dealings between Shriners Hospitals
15 for Children and Vantage with respect to the matter of
16 Vantage serving as Professional Fundraising Counsel for
17 Shriners Hospitals?

18 A April of 1999.

19 Q At the time that you -- well, strike it out.
20 How did you become involved at that time? What was the
21 occasion for your becoming involved?

22 A I was directed by the officials of Shriners
23 Hospitals to whom I answer to prepare a satisfactory
24 agreement with Vantage to act as fundraising counsel.

25 Q Who were the people at Shriners Hospitals who

Page 11

1 you dealt with with respect to this matter?

2 A Would have been Mr. Ralph Semb. He was, at the
3 time, a chairman of the board of directors of the
4 corporation. He's the individual that primarily I dealt
5 with. And, second, a Mr. Gene Bracewell, that's G-E-N-E,
6 Bracewell, who I believe at the time -- I can't recall
7 exactly -- was the treasurer of the hospital
8 organization.

9 Q At the time you were asked to become involved,
10 did you acquire any understanding as to what the status
11 of the matter was at that point?

12 A The status?

13 Q Yeah. For example, at the time you were asked
14 to become involved had somebody prepared some proposed
15 draft of an agreement?

16 A No. I became involved -- the brief chronology
17 was I was at a board of directors meeting where this
18 matter was discussed, and I listened to what this
19 discussion was, and I think that prior to that I had been
20 presented a draft of a proposed agreement from Mr. Semb.
21 I don't know exactly from whom he received that.

22 Q So I gather when you became involved at about
23 that time you became aware that there had been some draft
24 of a proposed agreement that had been communicated
25 between the parties?

Page 12

1 A Yes, that's correct.

2 Q Okay. Were you asked to do anything with
3 respect to that draft?

4 A With respect to that draft I was asked to make
5 a preliminary review of it.

6 Q Did you do so?

7 A I did.

8 Q Okay. Did you prepare a memorandum to your
9 superiors at SHC with respect to that draft?

10 A I don't recall. It was six years ago.

11 MR. JOHNSON: Let's mark as the first exhibit
12 for identification a memorandum dated April 13,
13 1999, from Jay Fleisher to Ralph Semb with what
14 purports to be the attached draft of an agreement.
15 It's SHC Bates Numbers 388 through 402.

16 BY MR. JOHNSON:

17 Q Mr. Fleisher, I placed before you Fleisher
18 Exhibit 1, and ask if you would take a look at it and
19 tell me do you recognize it, sir?

20 A Yes.

21 Q Would you take a look at the draft agreement,
22 which is an attachment to your memo, and tell me whether
23 you recognize that as well?

24 A Begins with Page 2.

25 Q I noticed that.

Page 13

1 **A I don't recall precisely this agreement. I**
 2 **know that I did review an agreement at that time.**
 3 **Q Do you recognize your memorandum --**
 4 **A Oh, yes.**
 5 **Q -- as the memorandum that you prepared with**
 6 **respect to the --**
 7 **A Yes, I do.**
 8 **Q -- first draft that you looked at the beginning**
 9 **of your involvement in this matter?**
 10 **A Yes.**
 11 **Q Okay. And was that the draft which somebody**
 12 **had supplied to you as having come into existence before**
 13 **you became involved?**
 14 **A I cannot be 100 percent sure, but if you're**
 15 **asking me to presume, I guess, the memorandum speaks for**
 16 **itself. Quite a few different drafts of that agreement.**
 17 **Q Okay. Is it consistent with your best**
 18 **recollection that the draft that's attached to your**
 19 **memorandum was the draft that your memorandum refers to?**
 20 **MR. GRIFFIN: Objection.**
 21 **A Bear with me.**
 22 **BY MR. JOHNSON:**
 23 **Q By all means. And just by way of suggestion --**
 24 **A It would appear to me to be the agreement that**
 25 **pertains to this memorandum by briefly reviewing the**

Page 14

1 **comments in the memorandum to the agreement. I cannot be**
 2 **100 percent sure that this was the precise agreement that**
 3 **I looked at.**
 4 **Q Would you look at Item 25 in your memorandum**
 5 **and would you then --**
 6 **A Yes.**
 7 **Q -- would you then look at Paragraph 12.1 of the**
 8 **draft which is attached to Exhibit 1. Look at it and**
 9 **then tell me whether 12.1 is a draft that's attached to**
 10 **Exhibit 1 appears to be the provision that you were**
 11 **referring to in Item 25 of your memorandum?**
 12 **A Yes.**
 13 **Q Now, at the time that you reviewed the draft**
 14 **and prepared your memorandum which is part of Exhibit 1,**
 15 **had Mr. Semb or anybody else at SHC told you anything**
 16 **about any of the business aspects of the proposed**
 17 **arrangement between SHC and Vantage?**
 18 **A No. I didn't learn of those until a subsequent**
 19 **board meeting which was a few -- I think about a week**
 20 **after this.**
 21 **Q Okay. And I take it that at the time you**
 22 **prepared your memorandum it was your assumption that the**
 23 **payment provisions were just going to provide in**
 24 **substance that Shriners was going to pay whatever it was**
 25 **supposed to pay under the contract, whatever the charges**

Page 15

1 that the contract provided for were?
 2 **MR. GRIFFIN: Objection.**
 3 **A Again, I don't know if I can assume that or**
 4 **you're asking me to assume that. I went ahead, I made**
 5 **comments concerning that -- you've got to remember this**
 6 **was six years ago. I made comments concerning that**
 7 **within the context of being presented this agreement by a**
 8 **single corporate officer before it was presented to our**
 9 **boards of directors for review of the business matters.**
 10 **BY MR. JOHNSON:**
 11 **Q May I take a quick look at the exhibit? In**
 12 **Item 25 when you wrote with respect to Paragraph 12.1,**
 13 **"Section 12.1 should simply state the termination is upon**
 14 **30 days and that upon the 30th day Vantage will cease all**
 15 **solicitation and that SHC will pay to Vantage all**
 16 **outstanding invoices submitted to SHC in accordance with**
 17 **other terms of the agreement," did that reflect your then**
 18 **current understanding of what the arrangement was going**
 19 **to be with respect to that aspect of the transaction?**
 20 **A I believe it was my then current. Subsequently**
 21 **it was changed.**
 22 **Q I understand. When did your understanding of**
 23 **that change?**
 24 **A At a board meeting in -- shortly after that in**
 25 **April of 1999.**

Page 16

1 **Q And how did your understanding of that change**
 2 **at the board meeting?**
 3 **A I was present at the board meeting and the**
 4 **question was asked numerous times of the person who was**
 5 **presenting this proposal, which is Mr. Semb, if there was**
 6 **going to be any risk of loss to Shriners Hospitals for**
 7 **Children if the total proceeds received from the program**
 8 **did not cover the cost of the program.**
 9 **And Mr. Semb made it very clear to the board**
 10 **members that that was not the case. That there would be**
 11 **no exposure to the Shriners Hospitals for Children to any**
 12 **risk of loss in this. That he had been assured that by**
 13 **Vantage, and, in fact, there were questions to that**
 14 **effect that were asked by other board members at that**
 15 **board session concerning that very point.**
 16 **And then subsequent to the board minutes I also**
 17 **worked with a number of other board members who**
 18 **had -- well, I can't remember exactly who they are, but**
 19 **my very clear understanding from that board meeting that**
 20 **I was present that the contract was to be prepared so**
 21 **that there was no exposure to loss by Shriners Hospitals**
 22 **by entering into the contract.**
 23 **Q Now, Mr. Fleisher, when you use the phrase**
 24 **"risk of loss" or "exposure to loss," is my understanding**
 25 **correct that by those phrases you are intending to**

Page 17

1 communicate that Shriners wasn't going to be in a
2 position where it would be obligated to pay for charges
3 in connection with the fundraising programs out of funds
4 or assets that didn't come or result from the programs
5 themselves?

6 **A That's correct.**

7 Q So that, in effect, is it fair to say that
8 Shriners' concern was that it didn't want to be in a
9 position where it might have to pay Vantage's program
10 charges by drawing on funds other than those generated
11 either from mailings or from the use of the donor list
12 developed in the course of the program?

13 **A That's not exactly correct.**

14 Q Okay. In what respect is it not correct?

15 **A You said in connection with the mailings. I**
16 **don't know about use of the donor list. I know that the**
17 **direction was that I was not to have the -- there was to**
18 **be no risk of loss to Shriners Hospitals for Children if**
19 **the proceeds of the campaigns, as a result of the**
20 **mailings, did not cover the expenses charged by Vantage.**
21 **So as far as the use of the -- I don't know exactly what**
22 **you're talking about as far as the use of the --**

23 Q Let me see if I can clarify. The programs
24 which were the subject of the proposed agreement, the
25 program had a dual objective, did it not? First of all

Page 19

1 additional source of revenue, not raiding upon Shriners'
2 other funds, could also be realized by the possible
3 rental or exchange of the donor list developed in the
4 course of the programs?

5 **A That's true.**

6 Q And if and to the extent that the donor list
7 came to have some potential economic value, that economic
8 value also resulted from the programs, didn't it?
9 Because the donor list was developed as part of the
10 programs?

11 **A That had a value. I could not put a dollar**
12 **value on it.**

13 Q I understand that.

14 **A Yes.**

15 Q But whatever -- if it had some economic value
16 and if that value could be applied to satisfy program
17 charges, I take it that, too, was a way of avoiding
18 Shriners being in a position of having to pay program
19 charges from its other resources that didn't result from
20 programs?

21 **A I believe that's the case, but I have not**
22 **looked at that contract in a long time.**

23 Q Okay. From the point of view of SHC,
24 Mr. Fleisher, is it fair to say that as the dialogue that
25 ultimately resulted in the agreement progressed it came

Page 18

1 to raise money; but, secondly, in the course of raising
2 money to develop a list of donors, people who had been
3 solicited and have contributed something to SHC and whom
4 you could go back to again?

5 **A That's true.**

6 Q So that the programs were going to develop two
7 things. They were going to develop contributions by way
8 of response, and they were also going to develop and
9 effect a solicitation list of donors for purposes of
10 future fundraising?

11 **A That's correct.**

12 Q Okay. And is it fair to say that SHC's concern
13 in this was that it didn't want to have to resort to
14 other resources to pay the program charges of these
15 programs? It wanted the program, in effect, to be
16 self-sustaining?

17 **A In essence, that's correct. My marching**
18 **orders, as they were, were that the invoices submitted by**
19 **Vantage were not to be paid by funds other than those**
20 **that were generated by the solicitations that we had made**
21 **in connection with the program.**

22 Q Now, at some point did you consider the
23 question of whether if funds -- funds -- funds raised by
24 solicitation mailings, if those didn't generate enough
25 contributions to pay program charges, whether an

Page 20

1 at least to be Shriners' position that it didn't want to
2 have to pay program charges out of nonprogram-related
3 revenues, but that within revenues generated from the
4 programs it didn't really care how those were used as
5 long as it didn't have to cut a check from its other
6 accounts?

7 **A I can't speak on behalf of the entire**
8 **organization, but I believe that's how the final**
9 **agreement was arranged.**

10 Q Okay. Now --

11 **A But there is an ultimate cutoff of that.**

12 Q We'll get to it. Now, at some point -- well,
13 strike it out. Let me start again. When you first
14 became aware during the board meeting that Mr. Semb had
15 indicated that Shriners wasn't to have any liability to
16 pay program charges except from the receipts from the
17 program, did you consider whether one way to accomplish
18 that -- one way to satisfy that interest would be to
19 simply have a provision saying that Shriners wasn't going
20 to have any liability except to the extent of the program
21 receipts?

22 MR. GRIFFIN: Objection.

23 **A Not at that meeting.**

24 **BY MR. JOHNSON:**

25 Q At any meeting. At any point did that occur?

Page 21

1 **A Yes, that's correct.**

2 **Q** As a possible modality for addressing Shriners'
3 concern?

4 **A Yes, you are correct.**

5 **Q** Okay. And at some point did you become aware
6 that there was a problem or a potential problem with
7 respect to addressing SHC's interest by that means?

8 **A When I first received the contract from**
9 **Mr. Miller subsequent to the board meetings, it did not**
10 **include any provisions which would insulate Shriners**
11 **Hospitals from loss should the proceeds from the mailings**
12 **not cover the costs of the program.**

13 **Q** Okay. And when you received that draft -- and
14 that, I take it, was a later draft than the one that's a
15 part of Exhibit 1, was it not?

16 **A Correct.**

17 **Q** I take it you had some discussion with
18 Mr. Miller about that?

19 **A Yes.**

20 **Q** The subsequent draft are among the things which
21 my secretary has FedExed down to here care of your
22 office, so hopefully they will arrive while we're talking
23 and we can identify the draft you're talking to.

24 When you got that draft that you felt didn't
25 insulate SHC from risk of loss if the receipts of the

Page 23

1 representation that had been made to our board members
2 and subsequently by our boards members to me that there
3 would be no risk of loss, and I believe he referred to
4 postal regulations.

5 And subsequent to that time I contacted our
6 attorney, who has since passed on, Mr. William Lehrfeld
7 in Washington, D.C., concerning that; and he looked at
8 it, and he did not believe it was going to be a problem
9 to have Shriners Hospitals for Children insulated from
10 loss. So I proceeded on that basis.

11 **Q** But Mr. Miller had told you that in his view
12 there was some potential problem with Shriners simply
13 being insulated from loss, as you put it?

14 **A Yes. But I don't believe he went into that in**
15 **any great detail. He may have sent me some postal**
16 **regulations at the time, and that's what I sent to**
17 **Mr. Lehrfeld.**

18 **Q** Did either Mr. Miller or Mr. Lehrfeld, in your
19 communications with them, employ the phrase "Cooperative
20 Mail Rule"?

21 **A Yes, I believe I remember that phrase.**

22 **Q** I take it that's a phrase that's now meaningful
23 to you?

24 **A No, I don't do any more mailings so --**

25 **Q** Did it become meaningful to you during the

Page 22

1 programs weren't enough to pay the program charges, did
2 you have some discussion with Mr. Miller about that?

3 **A Yes, I did.**

4 **Q** And was it as a result of that discussion that
5 you became aware that there was a potential legal problem
6 with respect to simply exculpating SHC from liability
7 from -- from the program charges if there was a shortfall
8 in the program?

9 **A No.**

10 **Q** Did you eventually become aware of that, that
11 there was a potential problem from some source?

12 **A No.**

13 **Q** Did Mr. Miller ever tell you that the U.S.
14 Postal Service had some regulations which had an
15 application or a potential application to the kinds of
16 arrangement with respect to payment that SHC and Vantage
17 could make?

18 **A I believe he did.**

19 **Q** Okay. And do you remember what in substance it
20 was that he told you about that?

21 **A I can give you the gist of what I remember from**
22 **six years ago.**

23 **Q** Good.

24 **A Was that he told me -- I asked him why the**
25 **agreement that he prepared was inconsistent with the**

Page 24

1 course of the negotiation of the SHC/Vantage agreement?

2 **A I became aware of the rule. I don't know if it**
3 **became meaningful.**

4 **Q** All right. Did you become aware that there was
5 at least some of the people involved in the dialogue with
6 you felt that there was a potential -- there was a
7 potential issue that needed to be addressed in the
8 agreement and in the payment provisions of the agreement
9 so that those payment provisions wouldn't conflict with
10 the postal services regulations?

11 **MR. GRIFFIN: Objection.**

12 **A Mr. Miller provided me during those early**
13 **negotiations with a proposed separate promissory note**
14 **where Shriners Hospitals for Children would, I believe,**
15 **execute a promissory note in favor of Vantage to pay any**
16 **excess. I don't remember the terms of the promissory**
17 **note.**

18 I also consulted the late Mr. Lehrfeld at that
19 time as to whether there was any necessity to execute
20 such a promissory note. He told me there was not. So
21 then I proceeded.

22 **BY MR. JOHNSON:**

23 **Q** So I take it you didn't proceed further with
24 the promissory-note modality for dealing with payment
25 questions?

Page 25

1 **A Correct.**
 2 Q I take it that you -- with respect to the legal
 3 matters, is it fair to say that you on behalf of SHC and
 4 Mr. Miller on behalf of Vantage were the people who were
 5 carrying the ball primarily with respect to the legal
 6 aspects of the agreement?
 7 **A That's true.**
 8 MR. GRIFFIN: Objection.
 9 **A That's true.**
 10 **BY MR. JOHNSON:**
 11 Q Did you have any direct contact with anybody
 12 else on behalf of Vantage other than Mr. Miller?
 13 **A At what point?**
 14 Q Up through the time that the agreement was
 15 executed, and I think it was around June 17 of 1999.
 16 **A Yes. I believe there was a conference between**
 17 **myself and Mr. Bracewell on behalf of Shriners and**
 18 **Mr. Larry Lyon, and I can't remember if there was another**
 19 **person. I believe it was just Larry Lyon. And there was**
 20 **a conference at the headquarters concerning the**
 21 **agreement.**
 22 Q Down here in Tampa?
 23 **A Yes.**
 24 Q Okay. And was there also a conference call
 25 that you participated in maybe a week or ten days after

Page 26

1 that meeting in Tampa with at least you on behalf of SHC
 2 and Mr. Miller and perhaps Mr. Lyon on behalf of Vantage?
 3 **A There may have been, but I do not specifically**
 4 **recall that.**
 5 Q Okay. At some point in the course of the
 6 dialogue and negotiation, was some other proposal made by
 7 either side with respect to a way for dealing -- a way to
 8 deal with the payment issue something other than the
 9 promissory note modality that you had decided was not
 10 satisfactory, I take it?
 11 **A Yes.**
 12 Q Okay. Who made that proposal?
 13 **A I believe that proposal -- that proposal was**
 14 **made by Mr. Miller. It was not made by any one of our**
 15 **attorneys.**
 16 Q Was it reflected in a draft sent down to you by
 17 Mr. Miller?
 18 **A I do recall distinctly receiving a draft,**
 19 **subsequent draft, from the one we're talking about that**
 20 **had various alternatives resolving the problem short of**
 21 **Shriners Hospitals for Children having to expend any**
 22 **out-of-pocket money.**
 23 Q Okay. Mark as the next exhibit a copy of the
 24 agreement to provide fundraising consulting and
 25 management services dated June 17, 1999?

Page 27

1 MR. GRIFFIN: What's the Bates on that, Larry?
 2 MR. JOHNSON: SHC4962 through 4982.
 3 **BY MR. JOHNSON:**
 4 Q Do you recognize Exhibit 2, Mr. Fleisher?
 5 **A Yes, I do.**
 6 Q Is that a copy of the Shriners/Vantage
 7 agreement as ultimately executed?
 8 **A Yes, it is.**
 9 Q At some point during the course of this
 10 litigation, the Vantage/Miller litigation, Shriners was
 11 requested by Mr. Miller's attorney, was it not, to
 12 provide copies of certain documents?
 13 **A By Mr. Miller's attorneys?**
 14 Q Yes, sir.
 15 **A Oh, during --**
 16 Q During the course of this litigation, the
 17 current litigation that you're testifying in today.
 18 **A Yes.**
 19 Q Okay. And I take it that SHC provided copies
 20 of certain documents from its records that had been
 21 requested by Mr. Miller's attorneys?
 22 **A Yeah. We did so only because we knew the**
 23 **documents could be subpoenaed anyway and why go through**
 24 **the -- so they were supplied, yes.**
 25 Q I understand. I'm not at all faulting you for

Page 28

1 having --
 2 MR. CANTER: They were subpoenaed.
 3 THE DEPONENT: They were?
 4 MR. GRIFFIN: I think we sent a subpoena to
 5 you, correct.
 6 MR. CANTER: Yes, they were subpoenaed.
 7 THE DEPONENT: Thank you for correcting my
 8 memory.
 9 **BY MR. JOHNSON:**
 10 Q My purpose is not to question the procedure
 11 that was followed. I take it that Exhibit 2 bearing an
 12 SHC Bates number, that's the copy of the agreement that
 13 comes from Shriners' own records?
 14 **A I couldn't tell you if that comes from**
 15 **Shriners' own records or not. There are so many copies**
 16 **of this. I don't know if this is from Shriners' own**
 17 **records.**
 18 Q Would you look at Paragraph 13.2, please, sir.
 19 **A Want me to read it?**
 20 Q Just so you're familiar with it, sure.
 21 **A Yes. I'll refresh my recollection. Yes, I**
 22 **have read it.**
 23 Q Now, is the provision to which I have just
 24 invited your attention, is that in substance the
 25 provision that was suggested by Mr. Miller as a means for

Page 29

1 dealing with the payment issue?
 2 MR. GRIFFIN: Objection.
 3 A In some form there were many, many
 4 conversations and negotiations concerning the ultimate
 5 wording of Section 13.2, and I don't know -- I can't
 6 recall which ones that -- which parts of those that I had
 7 suggested and which parts of that that he had suggested.
 8 I believe it was we both suggested some parts of it.
 9 BY MR. JOHNSON:
 10 Q Let me see if I can help. Let's mark as the
 11 next exhibit a letter dated May 24 from Mr. Miller to
 12 Mr. Fleisher. Do you recognize that, sir?
 13 A Yes.
 14 Q Did you receive that original of that document
 15 on or in due course of the mails after the date it bears?
 16 A I remember the document because there are
 17 some -- the check marks on the first page are not mine.
 18 The check marks on the second page -- the first one is
 19 not mine. The other three may be mine. On the -- this
 20 page, Page 3, I only have half the page here and the
 21 notations on that are there, but I don't see anything
 22 where it says it's been signed by anybody on the bottom.
 23 So I would presume this is a letter that I got
 24 from Mr. Miller, but I couldn't tell because there's no
 25 signature there. He had a number of other folks working

Page 30

1 at his law firm.
 2 Q Did you deal with anybody else in his law firm
 3 other than Mr. Miller with respect to the SHC/Vantage
 4 agreement?
 5 MR. GRIFFIN: Objection.
 6 A The contract itself?
 7 BY MR. JOHNSON:
 8 Q The contract itself, yes. I understand
 9 perfectly well you dealt with some other people after the
 10 contract was executed with respect to registration
 11 matters.
 12 A To the best of my recollection, it was only
 13 Mr. Miller on behalf of Nonprofit Service Group as far as
 14 negotiating an agreement.
 15 Q Okay. Does the last page or paragraph of
 16 Exhibit 3 refresh your recollection as to --
 17 A The last paragraph?
 18 Q Yeah. Some of the -- what appears on Page 3,
 19 the last page of the exhibit, as to part of the process
 20 of negotiation of the payment provision.
 21 A Where it says "adds the following proprietary
 22 materials"?
 23 Q Right.
 24 A I don't recall that specifically. The only
 25 thing I do recall is the little squiggly line with a

Page 31

1 circle in it and X insert meant there was some language
 2 in there that I wanted to insert.
 3 Q Okay.
 4 A There were -- yeah, a lot of going back and
 5 forth on this agreement.
 6 Q Now, that portion of Exhibit 3 deals with a
 7 proposed modification of Paragraph 13.1, does it not?
 8 A On the top of the third page it deals with --
 9 yes. In addition to 13.1(b).
 10 Q And 13.1(a) and (b) deal with payment
 11 modalities in the event of termination without cause by
 12 Shriners, do they not?
 13 A As best as I can recall.
 14 Q Take a look at the agreement. I think you
 15 will --
 16 A The best I recall, yes, that's correct.
 17 Q Does Exhibit 3 contain any proposed
 18 modifications with respect to Paragraph 13.2, that's the
 19 provision with respect to termination for reasons other
 20 than termination without cause?
 21 A Would not appear so from here. Just speaks to
 22 section 13.1 and 13.3.
 23 Q Okay. Let's mark as the next exhibit an e-mail
 24 from Christine Gray to Mr. Fleisher dated May 26, 1999.
 25 A Hang on just a second.

Page 32

1 Q Sure.
 2 A During the course of all these negotiations,
 3 there was so many -- there were so many changes to this
 4 agreement that at one point or another there were various
 5 renumberings of paragraphs. And the phrase that you're
 6 talking about "Vantage shall mail to program donors for
 7 36 months until all outstanding billing statements are
 8 paid," the one circled on this in Exhibit 3, that -- one
 9 form of that showed up on 14.2.
 10 So at that point I truthfully cannot remember
 11 if -- I would presume that 13.1(b) speaks to the 13.1(b)
 12 of the final agreement at that point in the negotiations.
 13 I cannot recall if 13.1(b) was then at that time the
 14 equivalent of what 13.2 ended up to be. I don't know if
 15 that answers the question.
 16 Q I think the next exhibit I'm going to mark for
 17 identification may clarify that point for you. Let's
 18 mark as Exhibit 4 an e-mail from Christine Gray to
 19 Mr. Fleisher dated May 26, 1999, with an attached revised
 20 draft to the agreement SHC200 through 220. Do you
 21 recognize Exhibit 4, sir?
 22 A Yes. Christine Gray is a paralegal in our
 23 department, and she had sent this e-mail to me regarding
 24 the agreement of fundraising services. I remember
 25 receiving something like that or I remember receiving

Page 33

1 this particular e-mail.

2 Q And I take it that with that e-mail Mrs. Gray
3 transmitted to you a -- whatever the latest draft that
4 had been received from Mr. Miller's office was?

5 MR. GRIFFIN: Objection.

6 A It shows that a Word document was attached. I
7 don't know if this is the final draft. I would have
8 to -- I would presume this is the thing that was attached
9 as the Word document to Ms. Gray's e-mail. I cannot be
10 100 percent sure, and I can't be 100 percent sure if this
11 is the final one I received from Mr. Miller.

12 BY MR. JOHNSON:

13 Q Would you look at Paragraphs 13.1 and 13.2 of
14 the draft? Does Paragraph 13.1 reflect the change
15 discussed on the last page of Exhibit 3 which is also
16 before you?

17 A I hadn't finished 13.1 yet.

18 Q I'm sorry. Didn't mean to cut you off. Go
19 ahead.

20 A Let me do that and then if you'll ask the
21 question that would be better.

22 Q No problem at all.

23 A Okay. Now ask the question again, please.

24 Q Does the red-lined change with respect to
25 Paragraph 13.1 in the draft that's a part of Exhibit 4 --

Page 35

1 Exhibit 4, are there any red-line changes whatsoever in
2 Paragraph 13.2?

3 A Well, not in the version that you've attached
4 to Exhibit 4. I don't see any changes -- red-line
5 changes to 13.2.

6 Q Now, did you discuss with Mr. Miller at some
7 point either before or after the transmission of
8 Exhibits 3 and 4, the changes that are discussed in those
9 exhibits are indicated in them with respect to Paragraph
10 13.1(b) dealing with termination without cause?

11 A Yes, I would have discussed those with him.
12 Certainly.

13 Q And is it fair to say that as of the time that
14 the draft reflected in Exhibit 4 was prepared that you
15 and Mr. Miller had reached common ground with respect to
16 the provision reflected in the red-line version of
17 Paragraph 13.1(b)?

18 MR. GRIFFIN: Objection.

19 A If that would be correct. If, in fact, 13.1(b)
20 red-line changes ended up being in the 13.1(b) of the
21 final agreement.

22 BY MR. JOHNSON:

23 Q Can you satisfy yourself that that's the case?

24 A I'll have to read it word for word here.
25 Somebody want to read it out loud then I can see if --

Page 34

1 A 13.1(b)?

2 Q Yes. 13.1(b).

3 A Yes.

4 Q Is that the change that's discussed on the last
5 page of Exhibit 3, the exhibit that's just ahead of you
6 there?

7 A This change on Exhibit 3 you're talking about?

8 Q Proposed change with respect to paragraph 13.1
9 and --

10 A Okay. Where it says "add to 13.1 be the
11 following sentence, approval shall not be unreasonably
12 withheld"?

13 Q Right.

14 A That, the phrase "approval shall not be
15 unreasonably withheld" in this letter which is 3 is
16 reflected in 13.1(b).

17 Q (b), right.

18 A It says, "Shriner approval shall not be
19 unreasonably withheld," that's correct.

20 Q Okay. And is the additional suggested change
21 with respect to 13.1(b) appearing in the next paragraph
22 of Exhibit 3 also reflected in the red-line version of
23 Paragraph 13.1(b) attached to Exhibit 4?

24 A It's in the red-line, that's correct.

25 Q Okay. In the draft that's attached to

Page 36

1 Q Would you like me to read Paragraph 13.1(b)?

2 A Well, I can get it here.

3 Q Okay.

4 A There is a difference between some of the text
5 in this Exhibit 4 and the text in the final agreement.
6 No, this did not find its way into -- no, these
7 paragraphs are different and the highlighted language
8 where it says "Vantage shall mail to program donors for
9 36 months until all outstanding billing statements are
10 paid or until such mailings no longer produce net revenue
11 at which time Shriners shall be responsible to pay the
12 balance" is not the exact same wording that's in this
13 final version.

14 Q The difference is that instead of net revenue
15 the final version called it net income?

16 A I believe so. Yes, net income. Correct.

17 Q Is there any difference substance in the two
18 provisions?

19 MR. GRIFFIN: Objection.

20 A I believe there is. I would have to go through
21 the entire agreement to figure out and remember why.
22 There is a difference, I believe, between net revenue and
23 net income, as I recall from the time. I would have to
24 go back through the entire agreement. I think there is a
25 definition section in the agreement. There's also

Page 37

1 another change from this paragraph.
 2 Well, the only difference is the sentence in
 3 the middle where it says "Vantage may continue" -- and
 4 this is not the highlighted one. Says "Vantage may
 5 continue to conduct donor renewal mailings or continue to
 6 render, exchange Shriners donor file" so forth and so on,
 7 there is a phrase -- the words "which is outstanding upon
 8 termination" in this version attached as Exhibit 1, and
 9 the words "which is" are not in this version. Just says
 10 "outstanding upon the termination of the agreement." So
 11 these two paragraphs are not exactly the same.
 12 BY MR. JOHNSON:
 13 Q I understand they are not exactly the same.
 14 The differences you identified, the use of the phrase
 15 "net revenue" in the draft as opposed to net income in
 16 the agreement as executed, would you look back at the
 17 definition section?
 18 A On which?
 19 Q Paragraph 1 on the draft.
 20 A The draft or the final agreement?
 21 Q The draft. The one that uses "net revenue."
 22 A Okay.
 23 Q If you will look at the definitions.
 24 A Of net revenue?
 25 Q Yeah.

Page 38

1 A Okay.
 2 Q It should be around 1.17, but it may not be
 3 exactly the same numbering. Was the phrase defined --
 4 the term there in the draft net revenue rather than net
 5 income?
 6 A No, there is no definition in here of net
 7 revenue in the -- this Exhibit 4.
 8 Q Is there a definition of net income?
 9 A Yes, in that draft.
 10 Q And there is no definition of net revenue?
 11 A Not that I can see from reviewing it.
 12 Q Okay. So the final agreement simply changed
 13 the phrase "net revenue" so that it would be consistent
 14 with the defined term "net income"?
 15 MR. GRIFFIN: Objection.
 16 A We've got net revenue in here and I would have
 17 to -- let me take a look and see if the definition in
 18 1.17 and net income in Exhibit 4 is the same definition
 19 as net income in 1.17. This one. The actual final
 20 version. Just compare the two.
 21 All right. The definition in the final
 22 agreement and Exhibit 4 of net income are the same
 23 wording. I cannot say for sure that the phrase was
 24 changed to net income just to be consistent. I would
 25 presume it would. I don't remember exactly why, but I

Page 39

1 do -- I would -- there is no definition of net revenue.
 2 BY MR. JOHNSON:
 3 Q Okay. On 13.1(b)?
 4 A Of which?
 5 Q Of the final.
 6 A The final.
 7 Q With respect to termination without cause,
 8 towards the bottom of the paragraph, there is a provision
 9 that says "Vantage shall mail to program donors for 36
 10 months until all outstanding billing statements are paid
 11 or until such mailings no longer produce net income, at
 12 which time Shriners shall be responsible to pay the
 13 balance." Do you see that?
 14 A Yes, I do.
 15 Q Okay. Can you and I agree that the substance
 16 of that provision, namely if the subsequent mailings
 17 haven't produced enough net income to pay off the
 18 balance, that Shriners was going to be responsible to pay
 19 the balance, that the substance of that provision also
 20 appears in the draft that's a part of Exhibit 3 in
 21 13.1(b)?
 22 A They both appear on 13.1(b), yes.
 23 Q And both the draft and the final, right?
 24 A Yes.
 25 Q So I -- is it fair to say that by that time you

Page 40

1 and Mr. Miller had come to common ground, that at least
 2 with respect to the eventuality of termination at
 3 Shriners' option without cause, that in that event if use
 4 of the mailing list and the follow-up mailings didn't
 5 produce enough money to pay the program charges that
 6 Shriners was going to be responsible to pay the balance?
 7 MR. GRIFFIN: Objection.
 8 A That's correct. If there was termination
 9 without cause by Shriners.
 10 BY MR. JOHNSON:
 11 Q And is it fair to say, Mr. Fleisher, that
 12 having in mind Shriners' concern that it didn't want in
 13 any event to have to cut a check for any balance from its
 14 nonprogram-related funds, is it fair to say that Shriners
 15 ultimately accepted that provision with respect to
 16 termination without cause because it was satisfied that
 17 follow-up mailings and/or realization of money from use
 18 of the donor list was going to raise enough money to pay
 19 any program charges?
 20 A That would be pure speculation on my part.
 21 Q Did that represent some modification by SHC of
 22 its position that it didn't want in any circumstance to
 23 be obligated to have to cut a check from its
 24 nonprogram-related assets?
 25 A Yes, it did.

10

Page 41

1 Q Now, did you have any specific discussions with
 2 Mr. Miller about Shriners' willingness to do that in the
 3 circumstance of termination without cause?
 4 A Yes. That came up during the negotiations.
 5 Q What did you say to him and what did he say to
 6 you about that?
 7 A Specifically?
 8 Q Yeah.
 9 A You've got to remember this is six years ago.
 10 Q Did you incidentally have any practice of
 11 taking notes of your telephone communications?
 12 A Yeah, I took notes of telephone conversations.
 13 Q Let's mark as the next exhibit for
 14 identification a series of what purports to be
 15 handwritten notes. When you had telephone discussions
 16 with Mr. Miller, did you -- and when you made notes did
 17 you try to make notes of any discussion of substance of
 18 any matter that you thought was important --
 19 A Yes.
 20 Q -- to SHC?
 21 A That's our normal practice.
 22 Q So I take it that if you had a telephone
 23 conversation and you were discussing some matter of
 24 potential importance you would try to make a note of it?
 25 A Yes. Either there or on the file memorandum or

Page 42

1 on the document itself.
 2 Q Okay. And I take it that it's fair to say, is
 3 it not, that the payment provisions with respect to
 4 Vantage's program charges under the agreement, that was a
 5 matter of substantial importance to Shriners?
 6 A That's correct.
 7 Q So that if you had discussions with Mr. Miller
 8 about the payment terms or about the extent of Shriners'
 9 liability to make payment, that's the kind of thing you
 10 would have made a note about, right?
 11 MR. GRIFFIN: Objection.
 12 A Normally, depending upon how much time there
 13 was to conclude the transaction, there may not have
 14 been -- I know that there were times when I did not have
 15 time to take whole notes on everything.
 16 BY MR. JOHNSON:
 17 Q But normally with respect to something that you
 18 thought was important you would try to make a note of it,
 19 wouldn't you?
 20 MR. GRIFFIN: Objection.
 21 A That's my customary practice.
 22 BY MR. JOHNSON:
 23 Q Let me place Exhibit 5 before you and ask you,
 24 first of all, would you glance at the handwritten pages
 25 of that and tell me whether they are all handwritten

Page 43

1 notes of yours?
 2 A Yeah. Those are my handwriting. That's my
 3 handwriting. Let me look just to make sure, but sure
 4 looks like my handwriting. Yeah. Yes, they are.
 5 Q Okay. Would you glance through the notes which
 6 are now Exhibit 5 and tell me whether there are any of
 7 them that refer to discussion between you and Mr. Miller
 8 of the payment provisions, payment in the event of
 9 termination with cause or in the event of termination
 10 without cause?
 11 MR. CANTER: Go off the record.
 12 (Discussion off the record.)
 13 A I would appreciate it if you would repeat the
 14 question.
 15 BY MR. JOHNSON:
 16 Q Yes. The question asked you to just glance
 17 through your handwritten notes and tell me if any of them
 18 appear to refer -- appear to you to refer to any
 19 discussion you had with Mr. Miller of the payment
 20 obligations, payment provisions, of Paragraphs 13.1(b) or
 21 13.2 with respect to Shriners' obligations to pay program
 22 charges in the event of either termination without cause
 23 or termination for cause.
 24 A Yes.
 25 Q Okay. Which notes appear to deal with either

Page 44

1 of those issues?
 2 A One dated May 7 of 1999, regarding -- it says
 3 "George Miller agreement has been redrafted. New issue,
 4 own agreement for postage. Own agreement for direct
 5 mail. Loan money to Shriners' Hospital as a percentage
 6 to qualify for reduced rate of postage. SHC would have
 7 to be at risk to get reduced rates if the loan would
 8 qualify. SHC would be considered purchasing postage or
 9 SHC put out the funds itself for postage."
 10 Q Let's stay with May 7 for just for the moment
 11 then.
 12 A Also on May 4 there is -- my notes here say
 13 that Bracewell and Semb or Shriners officers spoke to
 14 Larry Lyon. And it says -- my notes say "clear up again
 15 that if expenses, costs (any outlay by Shriners
 16 Hospitals) exceeds gross income, Vantage absorbs in the
 17 test and the entire program." Okay. You are concerned
 18 with the conversations with George Miller, though,
 19 correct?
 20 Q Yeah. May 7. Okay. That refers to a
 21 conversation with Mr. Miller, or can you tell from your
 22 notes?
 23 A Yes, it does.
 24 Q And the excerpts that you read appears to
 25 reflect discussion of the promissory note proposal?

11

Page 45

1 A Yes.
2 Q Okay. That was the proposal that Shriners did
3 not proceed with, right?
4 A Correct.
5 Q Did -- do those notes refer to discussion of
6 any other payment modality other than the promissory note
7 proposal which didn't find its way into the agreement?
8 A No.
9 Q Okay. Let's go to the next discussion or did
10 you have any discussion on May 7 with Mr. Miller about
11 any payment modality other than the promissory note
12 proposal so far as your notes indicate?
13 A As far as my notes indicate, no.
14 Q Do you have any recollection independent of
15 your notes of having had any discussion on that occasion
16 with Mr. Miller?
17 A On that particular day?
18 Q On that particular day about any other payment
19 modality.
20 A I cannot recall something that happened over
21 six years ago on a particular day, and I cannot recall
22 that.
23 Q I quite understand.
24 A Sure.
25 Q Can we then go to the next occasion on which

Page 46

1 you either have an independent recollection of having
2 discussed payment modalities with Mr. Miller or as to
3 which your notes contain a reference to such a
4 discussion.
5 A These notes?
6 Q Any of the notes that are a part of Exhibit 5,
7 sir.
8 A All right.
9 Q I think I have included in Exhibit 5 all the
10 papers that were produced to Mr. Miller's lawyers in
11 which purported to be handwritten notes of yours.
12 A I see something here on May 18 of 1999. If
13 these are all of my notes. I can't tell from just
14 looking at it where it says "May 18, 1999, George Miller
15 Vantage proposal is to rely on donor to affix postage,"
16 and then it goes on "method to be decided."
17 Q Now, let's stay with that one for just a
18 moment. Is there anything else, any other reference in
19 your notes on that to the discussion on that occasion
20 with respect to any discussion of payment modalities,
21 just staying with May 18 for the moment?
22 A No, not that my notes would indicate.
23 Q Okay. Do your notes with respect to the May 18
24 portion that does refer to payment modalities, does that
25 refresh your recollection in any respect as to your

Page 47

1 discussion of payment modalities with Mr. Miller on that
2 occasion?
3 A Yes. On that occasion I believe that was the
4 first time -- I believe that was the first time that I
5 had learned about -- that I had been told by Mr. Miller
6 about the possibility of Shriners Hospitals for Children
7 entering into a loan-type of arrangement or fronting
8 money itself for postage.
9 Q I thought the May 7 contained discussion of
10 loans.
11 A Okay. May 7 is concerning loans. Now, let's
12 skip to --
13 Q I thought your notes on the May 18 discussion
14 with Mr. Miller said something about Vantage relying on
15 the donor list.
16 A To affix postage, that's correct.
17 Q Okay.
18 A Methods to be decided.
19 Q What does your note say with respect to your
20 discussion with Mr. Miller about payment matters?
21 A With respect to payment on these notes from May
22 18?
23 Q Your notes of your discussion with Mr. Miller
24 on May 18 to the extent that they refer to any discussion
25 of payment provisions, what do your notes actually say?

Page 48

1 A I can read them. Let's see. "Vantage proposal
2 list to George Miller 5/18/99. Vantage proposal is to
3 rely on the donor to affix postage. The method to be
4 decided." Which to me at that time would be the method
5 of how that's done would be worked out. "Until 18 months
6 deficit of 1.148 million" -- then I have a question
7 mark -- "five million to start." I have no idea what
8 that was. "Deficit is rolled forward and SHC is
9 ultimately responsible for all costs."
10 Then goes on to say "Commercial bulk rate at
11 test with difference in postage proposed go to term.
12 Shriners Hospitals for Children not liable." Then it
13 goes on "not liable" and plus something or other
14 exceeding gross income.
15 "If don't meet goals," which I would presume
16 would be the goals in the pro forma in the amount of
17 money raised from the mailings, "the bottom line is that
18 they," they being Vantage, "thinks Shriners bears all
19 cost exceeding gross income. Exposure to Shriners
20 Hospitals bottom line, all risk to Shriners Hospitals for
21 Children. Entire program, not just postage."
22 Q Now, the first part of that note, the part that
23 referred to Vantage relying on donors for postage, in
24 your understanding is that a reference to discussion of
25 payment of program charges or a discussion of how persons

Page 49

1 responding to solicitation mailings were going to send in
2 their response?

3 **A My understanding I believe at that time is that**
4 **the Shriners Hospitals for Children would be paying the**
5 **postage to send out the mailings and also be paying for**
6 **postage for any mailings that were mailed back.**

7 **Q Is it the latter part which you understand to**
8 **be referred to in that first reference in your notes**
9 **there?**

10 **A I couldn't tell. I cannot tell.**

11 **Q Now, the remainder of your notes about this,**
12 **does -- I take it you had a discussion on that occasion**
13 **on May 18 with Miller in which he was telling you that in**
14 **order to mail at nonprofit rates SHC still had to be**
15 **ultimately responsible for any shortfalls?**

16 **A That's correct.**

17 **Q Okay. Does this refresh your recollection that**
18 **as of May 18 you and Mr. Miller hadn't yet found a**
19 **modality to address that problem and still give Shriners**
20 **satisfactory comfort that it wasn't going to have to cut**
21 **a check from its own funds?**

22 **MR. GRIFFIN: Objection.**

23 **A I believe so. That's correct.**

24 **BY MR. JOHNSON:**

25 **Q Does -- do your notes with respect to May 18**

Page 51

1 independent recollection of having had any discussion of
2 that particular topic with Mr. Miller on that occasion?

3 **A Not with Mr. Miller.**

4 **Q Okay.**

5 **A Others.**

6 **Q Do you have any discussion of that -- of that**
7 **topic with anybody else at Vantage?**

8 **A I believe -- I cannot recall if -- I can't**

9 **recall the times that there were negotiations with**
10 **Mr. Bracewell and myself and Mr. Lyon aside from whatever**
11 **negotiations we had with Mr. Miller that I recall Larry**
12 **Lyon as making the distinction of termination by Shriners**
13 **if it just wanted to walk away from the program and**
14 **termination by Shriners if for some reason Vantage was**
15 **not performing under the program, such as -- you know,**
16 **which would be for cause.**

17 **And there were many conversations around that**
18 **time, because it was -- there was a lot of discussion**
19 **because the program was presented by Mr. Miller at that**
20 **time as different than it had been presented to us, and**
21 **subsequently there was -- obviously ended up with a**
22 **difference in termination with and without cause.**

23 **And I seem to recall -- I cannot be 100 percent**
24 **positive -- that there was a conversation with myself and**
25 **Larry Lyon and possibly Mr. Bracewell over how do we**

Page 50

1 refresh your recollection as to whether on that occasion
2 you had any discussion with Mr. Miller about there being
3 any -- about any potential difference between Shriners'
4 obligations to pay a shortfall in the event of
5 termination for cause as opposed to its obligation in the
6 event of termination without cause?

7 **MR. GRIFFIN: Objection.**

8 **A What I do recall is expressing surprise at**
9 **Mr. Miller's statement that Shriners Hospitals for**
10 **Children would have to be liable for the costs that**
11 **exceed gross income because it had been represented to us**
12 **by other employees at Vantage that that would not be the**
13 **case.**

14 **BY MR. JOHNSON:**

15 **Q Let's just stick with my question, though, if**
16 **we may.**

17 **A Okay.**

18 **Q Do your notes reflect any discussion on May 18**
19 **with Mr. Miller about there being any difference between**
20 **the extent of Shriners' liability to pay a shortfall in**
21 **the event of termination for cause as compared with the**
22 **extent of its liability to pay such a shortfall in the**
23 **event of termination without cause?**

24 **A No, there is no discussion of any difference.**

25 **Q Okay. And I take it that you don't have an**

Page 52

1 resolve this in situations where there is cause or not
2 cause.

3 **Q Do you have any -- in your notes is there any**
4 **reference to any such conversation with Mr. Lyon and**
5 **Mr. Bracewell?**

6 **A Not in these notes. This was a conversation**
7 **that may have occurred. Best of my recollection, it**
8 **would have been subsequent to these. Because this is --**
9 **it would have been subsequent to this because these notes**
10 **indicate that I spoke with Gene Bracewell at that time or**
11 **Terrie DeVassie wanted Gene to brief him.**

12 **May 18, 1999, Mr. Bracewell said this would be**
13 **a show stopper. No liability. Call Ralph. Ralph being**
14 **the chairman of the board of directors at that time. So**
15 **at that point, May 18, there was no resolution of our**
16 **final payment or being taken care of?**

17 **Q When after May 18 did you next have any**
18 **conversation with Mr. Miller about payment modalities?**

19 **A I don't recall exactly what date it was.**

20 **Q Do you have -- do any of your notes that are a**
21 **part of Exhibit 5 purport to refer to any period -- any**
22 **discussion at any time subsequent to May 18?**

23 **A Not in these. No, not subsequent. Not in**
24 **these notes.**

25 **Q I thought those were all the handwritten notes**

Page 53

1 that I have found.

2 **A They may very well be.**

3 **Q** Well, as you sit here today, do you have any
4 affirmative recollection of having had any discussion
5 with Mr. Miller about the provisions of Paragraph 13.1(b)
6 and/or 13.2 with respect to Shriners' obligations to pay
7 for any shortfall in the event of termination with or
8 without cause other than what you've already testified
9 to?

10 **A Yes. I think there was a conversation**
11 **subsequent to that with him, and I think -- I cannot be**
12 **100 percent positive but I think Larry Lyon was on the**
13 **phone at the time and we were trying to work out an**
14 **acceptable resolution getting from Point A, being**
15 **Shriners Hospitals liable for everything if the gross**
16 **income didn't cover costs; and, B, Shriners Hospitals**
17 **being totally liable for everything in there. And I**
18 **cannot recall if those conversations were solely with**
19 **Mr. Miller or with Mr. Miller and Mr. Lyon together.**

20 **Q** Okay. Okay. You have a memory that at some
21 point you had a conversation at least with Mr. Miller,
22 possibly also with Mr. Lyon, about the subject of the
23 extent of Shriners payment obligations in the event of a
24 shortfall, right?

25 **A Correct.**

Page 55

1 **board officers involved and calls were going all the way**
2 **around, other than my calls with just Mr. Miller. So I**
3 **can't remember whether there was a compromise. I can't**
4 **remember if there was a compromise that was reached**
5 **between myself and Mr. Miller and Mr. Lyon or if that was**
6 **a compromise that was reached between board officers of**
7 **Shriners Hospitals for Children and officers or employees**
8 **of Vantage and then suggested to Mr. Miller and myself.**

9 **I do have a recollection that there were a lot**
10 **of what's called background deals or whatever at that**
11 **time.**

12 **Q** Well, is it consistent with your best
13 recollection that the language which appears in
14 Paragraphs 13.1(b) and 13.2 was in substance suggested by
15 Mr. Miller?

16 **MR. GRIFFIN: Objection.**

17 **A** The precise language may have been. The
18 precise language, I believe, was suggested by Mr. Miller,
19 but the idea of how 13.1(b) and 13.2 would operate I
20 cannot recall. Again, like I said, if that was suggested
21 by Mr. Miller or an idea suggested by one of the Vantage
22 businesspeople and carried out by Mr. Miller, that, I'm
23 sorry, I cannot recall that specifically.

24 **BY MR. JOHNSON:**

25 **Q** That you don't recall one way or the other, I

Page 54

1 **Q** Okay. Now, what's your best memory, sir, of
2 what you and Mr. Miller, or anybody else as to whom you
3 have a memory of having said something, actually said
4 during that conversation?

5 **A I'll go back to what I have said previously.**
6 **That to the best of my recollection the subsequent**
7 **conversations with Mr. Miller, a suggestion was made and**
8 **I believe the suggestion was made by Mr. Lyon that**
9 **Vantage had a concern with Shriners Hospitals for**
10 **Children just walking away from the deal, and they didn't**
11 **want to be left holding the bag, as it were, or a**
12 **situation where Vantage had somehow breached the**
13 **agreement and which would have ended up as 13.2**
14 **situation. And that's when we started to formulate what**
15 **finally resulted in the agreement with the termination**
16 **for cause and without cause.**

17 **Q** Well, who said what about there being any
18 difference between termination -- the payment obligations
19 if there was termination for cause as opposed to
20 termination without cause?

21 **A I can't recall who specifically said -- who**
22 **specifically suggested first termination with cause or**
23 **termination without cause and how that would be handled**
24 **differently. I don't know who exactly suggested that.**

25 **Because by that time there are a number of our**

Page 56

1 take it?

2 **A Correct.**

3 **Q** Okay. Now, putting aside the loan modality
4 which Shriners rejected, do you have an affirmative
5 recollection that Mr. Miller ever suggested any modality
6 with respect to payment of a shortfall other than the
7 substance of what appears in Paragraphs 13.1(b) and 13.2
8 of the agreement as ultimately executed?

9 **MR. GRIFFIN: Objection.**

10 **A** The only other recollection I have -- and it
11 may be in connection with the loans suggestion, I can't
12 recall -- was Shriners Hospitals for Children putting up
13 a sum of money for postage to begin with and then that
14 postage being credited against something. That's in
15 those notes, but I don't recall specifically what that
16 dealt with.

17 **BY MR. JOHNSON:**

18 **Q** Okay. But either --

19 **A Very well could --**

20 **Q** -- either fronting some sum of money or signing
21 a promissory note for some money. Other than those, do
22 you recall any proposal with respect to ways of dealing
23 with payment for any program shortfall suggested by
24 Mr. Miller other than the substance of the provisions
25 that appear in Paragraphs 13.1(b) and 13.2 of the

Page 57

1 agreement as executed?

2 MR. GRIFFIN: Objection.

3 A No, I don't recall any.

4 BY MR. JOHNSON:

5 Q Okay. Now, do you recall any other proposals

6 that you or anybody else at Shriners made with respect to

7 that?

8 A No. Other than what I had said before

9 that -- other than what I had said previously.

10 Q Now, when Mr. Miller proposed the promissory

11 note modality, you and your colleagues at SHC considered

12 that, didn't you?

13 MR. GRIFFIN: Objection.

14 A Rejected it.

15 BY MR. JOHNSON:

16 Q You considered it and rejected it, didn't you?

17 A Right.

18 Q And when Mr. Miller proposed the possibility of

19 Shriners simply putting up a fund upfront to cover

20 postage or maybe some other parts of program charges, you

21 considered and rejected that, didn't you?

22 A Correct.

23 Q Okay. And when Mr. Miller proposed the

24 modality that's reflected in Paragraphs 13.1(b) and 13.2,

25 you and your colleagues at SHC considered and ultimately

Page 58

1 accepted that, didn't you?

2 MR. GRIFFIN: Objection. It's not the

3 testimony.

4 A That's the question that Mr. Miller is the one

5 that suggested that. To the best of my recollection,

6 there is -- there were compromises -- there may have been

7 compromises outside of Mr. Miller and myself between

8 representatives of Shriners Hospitals and representatives

9 of Vantage which ended up in Mr. Miller and myself just

10 being the scriveners, as it were, of those.

11 BY MR. JOHNSON:

12 Q You said that there may have been, but I take

13 it you have no specific affirmative recollection that

14 permits you to testify that there were? That's correct,

15 isn't it?

16 A I cannot -- I could not testify as to any exact

17 date of conversations and persons who participated in

18 that. But I could testify or what I would testify to is

19 at that time, because of the surprise that our officers

20 had concerning the suggested way of final payment, that

21 the normal mode of business would have been for phone

22 calls to have been made outside of my office,

23 specifically -- well, I do recall corporate officers --

24 and I believe it was Mr. Bracewell or Mr. Semb getting a

25 call and telling me that they had spoke to folks at

Page 59

1 Vantage. I can't remember if it was Larry Lyon. And

2 this is the way that they would like to see it resolved

3 for cause or not for cause. More specific than that from

4 six years later, I couldn't tell you.

5 BY MR. JOHNSON:

6 Q And you weren't a party to any of those

7 conversations?

8 A No, I was not a party to any of those

9 conversations.

10 Q And other than learning from Mr. Bracewell that

11 there had been some discussion and that they wanted to

12 see the matter resolved -- now, did they tell you that

13 there was -- was there already proposed language in an

14 existing draft at that point?

15 A I don't know. I don't recall at that point.

16 Q Okay. Do you have an affirmative recollection

17 that Mr. Bracewell specifically mentioned that SHC wanted

18 the payment issue resolved dealing separately with the

19 circumstances of termination for cause as compared with

20 termination without cause?

21 A No, not an affirmative recollection from

22 Mr. Bracewell. Not from any specific person.

23 Q Do you have an affirmative recollection of

24 anybody at SHC telling you that?

25 A Telling what?

Page 60

1 Q That they -- that SHC had decided that it

2 wanted the payment issue resolved by provisions that made

3 some distinction between termination for cause as opposed

4 to termination without cause?

5 A None from a specific individual that I can

6 recall from six years ago.

7 Q Well, now, I take it that the language which

8 appeared in the various drafts -- incidentally -- strike

9 it out. Is it fair to say that the way that the

10 negotiation procedure was that in general you would

11 receive a draft from Mr. Miller's office, you would look

12 at it, you would respond with any comments, questions or

13 objections that you had and then there would be

14 discussion of those and a further draft would be

15 prepared? In other words, were most of the drafts --

16 A Yes.

17 Q -- prepared at Mr. Miller's end of things?

18 MR. GRIFFIN: Objection.

19 A That's the best of my recollection.

20 BY MR. JOHNSON:

21 Q Did you actually prepare any draft of the

22 agreement here in your own offices?

23 A No, no initial drafts. There may -- I know

24 that the agreement would have been on our word processor,

25 or whatever it was at that time, so I could look at it

15

Page 61

1 and there likely were changes and particular paragraphs
2 that would have been on the word processor sent out. But
3 I don't -- you know, most of the drafts of the agreement
4 were prepared by Mr. Miller and he would pare back the
5 changes I talked about.

6 Q Is it fair to say that Mr. Miller's office took
7 the labor in preparing the drafts?

8 A Yes.

9 Q And then you would respond to those and discuss
10 them with him, if necessary?

11 MR. GRIFFIN: Objection.

12 A That's correct.

13 BY MR. JOHNSON:

14 Q And after any such discussion would you receive
15 the draft containing or purporting to contain the changes
16 that you had discussed?

17 MR. GRIFFIN: Objection.

18 A That's correct.

19 BY MR. JOHNSON:

20 Q And it was those drafts which you as SHC's
21 managing attorney considered and reacted to right?

22 MR. GRIFFIN: Just a continuing objection to
23 the questions characterizing the process of the
24 negotiations.

25 MR. JOHNSON: Do whatever you feel you have to

Page 63

1 with whom I'm working -- was working closely, or Mr. Semb
2 that I was working closely with at the time, or Mr. Lyon
3 who may have been in on one of those conversations that
4 there would have to be a difference between Shriners
5 walking away from the proposal on a program for no reason
6 and Shriners walking away from a proposal for any other
7 reason.

8 Q Okay. I take it, though, that in the answer
9 you just gave me you're not intending to add to what you
10 already testified to about that, are you?

11 A No, I'm not. That's correct.

12 Q Okay. Is it fair to say that during the course
13 of the negotiation you and your colleagues at SHC had no
14 occasion to consider proposals with respect to shortfall
15 payments other than the proposals that were made during
16 the course of the negotiation?

17 MR. GRIFFIN: Objection.

18 A No. That's not entirely correct, because when
19 these negotiations were completed I had sent a memorandum
20 out explaining how the program would operate as far as
21 termination goes and never had anyone object to that
22 as -- on the Shriners end, the Shriners authorities.

23 BY MR. JOHNSON:

24 Q You sent out a memorandum to other people at
25 Shriners, I take it?

Page 62

1 do.

2 A Correct.

3 BY MR. JOHNSON:

4 Q Okay. Now, have you now told me about all of
5 the specific proposals with respect to ways of dealing
6 with payment for any program shortfalls that were
7 proposed or discussed during the course of the
8 negotiation of the Vantage/SHC agreement?

9 A Yes.

10 Q Okay. At the time is it fair to say that you
11 considered and responded only to the proposals which were
12 made from time to time during the negotiation with
13 respect to payment?

14 MR. GRIFFIN: Objection.

15 A Proposals made by whom?

16 BY MR. JOHNSON:

17 Q Made by Mr. Miller or anybody else at Vantage.

18 A Yes, that's basically correct.

19 Q Did you or to your knowledge your colleagues at
20 SHC initiate any proposals with respect to payment
21 yourselves other than the initial proposal that Shriners
22 should have no liability for paying any shortfalls?

23 A Then again, I would have to go back to the
24 recollection I had where I could not tell you specific
25 persons and dates, and it might have been Mr. Bracewell

Page 64

1 A Correct.

2 Q Not to Mr. Miller or anybody at Vantage?

3 A No, no. It was a memorandum to Shriners
4 personnel concerning this is the final way that this
5 agreement would operate. Here's a copy of the agreement.
6 Please review it. If you have any questions or so forth
7 concerning this operation, get back with me. And I never
8 got anything but go ahead.

9 Q The purpose of that memorandum was just to
10 explain to your colleagues at Shriners what the legal
11 effect of the agreement was as you understood it?

12 A Yes.

13 Q Okay. My question was a little bit different,
14 Mr. Fleisher.

15 A Okay.

16 Q During the course of the negotiation before you
17 got to a final agreement, isn't it fair to say that you
18 and your colleagues at Shriners did not have occasion to
19 consider proposals with respect to payment for shortfalls
20 other than the proposals that were actually made by
21 Mr. Miller or by others at Vantage during the course of
22 the negotiation?

23 MR. GRIFFIN: Objection.

24 A That's correct.

25 BY MR. JOHNSON:

Page 65

1 Q You didn't have occasion to consider any other
2 possible ways in dealing with the payment issue and you
3 didn't consider any ways possible -- possible ways of
4 dealing with it, did you?

5 MR. GRIFFIN: Objection.

6 A That's correct.

7 BY MR. JOHNSON:

8 Q Now, with respect to the payment provisions
9 ultimately incorporated into the agreement as reflected
10 in Paragraphs 13.1(b) and 13.2, did you ever have any
11 discussion with Mr. Miller as to whether those provisions
12 were or were not, in his judgment, sufficient to entitle
13 the program mailings to be made at nonprofit postal
14 rates?

15 A I don't recall any such discussions.

16 Q Did you ever have any discussion with
17 Mr. Miller as to whether those provisions as they appear
18 in the agreement were sufficient to comply with whatever
19 the postal service's Cooperative Mail Rule requirements
20 were?

21 A I can't recall any discussions to that effect.

22 Q Okay. Did you have any discussions with
23 Mr. Miller as to whether the payment provisions as
24 reflected in Paragraphs 13.1(b) and 13.2 represented a
25 common modality for payment in contracts between

Page 67

1 follow-up mailings both in Paragraphs 13.1(b) and 13.2 of
2 the agreement?

3 A I recall that he sent me a draft that had the
4 36-month provision in it or it might have been a longer
5 provision. I can't recall. It would be in the file.
6 And then if that was a period -- I cannot recall whether
7 the 36 months was accepted by our official right off the
8 bat or if there was another period and it was negotiated
9 down to 36 months or whether 36 months was just the
10 reasonable time that they thought.

11 Q I take it you don't recall any discussion.
12 either with Mr. Miller or with your colleagues at
13 Shriners one way or the other about the 36-month period?

14 A Not specifically, no.

15 Q And I take it you don't recall whether a longer
16 period had ever been proposed?

17 A Not specifically, no.

18 Q I take it you have no memory that there was
19 ever a proposal that there would be no time limit, do
20 you?

21 MR. GRIFFIN: Objection.

22 A I cannot be 100 percent certain but before the
23 prior agreement was signed -- before the agreement was
24 signed and subsequent to when we first found out about
25 the rule concerning cooperative mailing, so forth, that a

Page 66

1 not-for-profit organizations and professional
2 fundraisers?

3 MR. GRIFFIN: Objection.

4 A No, I never -- I don't recall asking about
5 that.

6 BY MR. JOHNSON:

7 Q Fair to say, is it not, that from your point of
8 view that isn't something that you were primarily worried
9 about, is it?

10 A Worried about?

11 Q Yeah. You weren't worried about --

12 A No, I was not.

13 Q And at the time, I take it, you were -- hadn't
14 received any information to cause you to be concerned
15 about it, had you?

16 A That's correct. Because we had had information
17 from our outside counsel that we really didn't have to be
18 concerned with the Cooperative Mailing Rule as far as
19 postage rates go. That was the late Mr. Lehrfeld, like I
20 testified previously. So once he had testified -- told
21 me that there was not a problem, I didn't think it was a
22 problem.

23 Q Okay. Now, did you have any discussions with
24 Mr. Miller about the reason for or the need for the
25 36-month time period that appears with respect to

Page 68

1 suggestion was made by someone that we just allow Vantage
2 to go ahead and continue the mailings to recover and it
3 went on.

4 BY MR. JOHNSON:

5 Q That was after the agreement had been signed?

6 A No. That would have been -- that would have
7 been before.

8 Q Do you have a memory that somebody proposed
9 that?

10 A I don't have a memory of a specific person
11 proposing that.

12 Q Do you have a memory that that was at some time
13 before the agreement was executed, proposed by Vantage or
14 somebody on behalf of Vantage?

15 A Yes. I have a recollection that that was --
16 that type of an arrangement was suggested by someone at
17 Vantage or someone who represented who Vantage. I could
18 not recall exactly who.

19 Q Well, if it was somebody who represented
20 Vantage I take it it would have been Mr. Miller, wasn't
21 it?

22 MR. GRIFFIN: Objection.

23 A No.

24 BY MR. JOHNSON:

25 Q No?

Page 69

1 **A No. Because of the many conversations that**
 2 **were had between -- that I was told about by -- you okay?**
 3 **Q Okay. I take it you were not limited yourself**
 4 **in the answer you gave to proposals that were made to**
 5 **you? You were including proposals that you may have**
 6 **heard about from some third source?**
 7 **A I was including proposals that I was told about**
 8 **by either Mr. Bracewell or Mr. Semb, that this is what**
 9 **you do, and it was not direction I got from Mr. -- I**
 10 **would have to explain that during these times of**
 11 **negotiations when there were situations where the parties**
 12 **were quite far apart it had been my experience that the**
 13 **negotiations that were lifted out of the realm of at**
 14 **least myself as an attorney and discussed between the**
 15 **Shriners businesspeople, primarily Mr. Semb and**
 16 **Mr. Bracewell and persons at Vantage and at that time the**
 17 **primary spokesman for Vantage was Mr. Lyon.**
 18 **Q Let me clarify my question a little bit because**
 19 **I'm not asking you about what you may have heard from**
 20 **some third-hand source or heard a rumor of or somebody**
 21 **told you about. I'm asking you about what you know about**
 22 **directly. At any time prior to the execution in the**
 23 **agreement did Mr. Miller or anybody else on behalf of**
 24 **Vantage ever make any proposal to you with respect to**
 25 **having payment provisions with follow-up mailings not**

Page 70

1 limited by any time period?
 2 **A Not directly to me that I recall. I had prior**
 3 **testimony on the other aspect of that.**
 4 **Q Prior to the execution of the agreement, sir,**
 5 **did either Mr. Miller or anybody else on behalf of**
 6 **Vantage ever make any proposal to you that with respect**
 7 **to termination for cause that if there was going to be a**
 8 **time period and if there was still a shortfall left at**
 9 **the end of the time period that then Shriners ought to**
 10 **have a choice as to whether it would pay the shortfall or**
 11 **extend the period in which either follow-up mailings or**
 12 **continued rental or exchange of the donor list would be**
 13 **permitted?**
 14 **A I could not recall that one way or the other**
 15 **specifically.**
 16 **Q So as we sit here today you cannot testify that**
 17 **any such proposal was ever made?**
 18 **A I couldn't, no. I could not recall any such**
 19 **proposal.**
 20 **Q And I take it you have no recollection of**
 21 **considering any such proposal, do you?**
 22 **MR. GRIFFIN: Objection.**
 23 **A I have a recollection of considering that**
 24 **proposal. I do not have a recollection of how the --**
 25 **specifically as to how that proposal came to me, but I do**

Page 71

1 **have a distinct recollection of considering that**
 2 **proposal.**
 3 **BY MR. JOHNSON:**
 4 **Q Considering a proposal that if at the end of**
 5 **the 36 months there was still a shortfall, that then it**
 6 **should be addressed either by further mailings or further**
 7 **permission to rent or exchange the donor list; you**
 8 **considered that?**
 9 **A Yes. Without any time limit.**
 10 **Q No, no. My question wasn't without any time**
 11 **limit. My question was if at the end of the time limit,**
 12 **the 36 months or whatever else, if there was still a**
 13 **shortfall, that then if there was a shortfall and if**
 14 **Shriners didn't want to pay the shortfall itself, that it**
 15 **should have the option of saying that either or both of**
 16 **you could continue to rent or exchange the donor list or**
 17 **you could send more follow-up mailings if they're still**
 18 **generating revenue?**
 19 **A I recall having to consider that proposal.**
 20 **Q What was the occasion for your considering**
 21 **that?**
 22 **A The occasion?**
 23 **Q Yeah.**
 24 **A I don't understand what you mean "occasion."**
 25 **Q You've already testified that Mr. Miller never**

Page 72

1 made any such proposal to you and that nobody else at
 2 Vantage ever made any such proposal to you. So if nobody
 3 had proposed it, what was the occasion for you
 4 considering it?
 5 **MR. GRIFFIN: Objection.**
 6 **A I believe that I testified before that I could**
 7 **not recall exactly who made such a proposal to me,**
 8 **whether it was Mr. Miller or any of the officers of**
 9 **Shriners Hospitals for Children. But I recall having**
 10 **considered that at one time before the contract or before**
 11 **the contract was finally executed.**
 12 **BY MR. JOHNSON:**
 13 **Q Do you have any note that refers to any such**
 14 **proposal ever having been made?**
 15 **A I don't know if I have any notes. That's from**
 16 **six years ago.**
 17 **Q Is there any correspondence that you either**
 18 **received from anybody or any draft that contains any such**
 19 **proposal or that contains any response of yours to any**
 20 **such proposal?**
 21 **A I could not say that one way or the other. I**
 22 **did not review the entire file before this deposition.**
 23 **Q Okay. You did, I take it, produce in response**
 24 **to the request for documents for Mr. Miller's lawyers all**
 25 **the documents that you had that bore on the negotiation**

Page 73

1 of the Shriners/Vantage agreement, didn't you?

2 **A That's correct.**

3 **Q** So I take it that if there are any drafts that

4 contain any such proposal or if there are any comments or

5 responses by you to any such proposal, they are reflected

6 in what has been produced, are they not?

7 **MR. GRIFFIN:** Objection.

8 **A** As I said before, during the latter parts of

9 the negotiations there were times where these

10 negotiations were so fast and furious that I did not have

11 time to take complete notes. It was my practice to try

12 and take complete notes as to any conversations that were

13 significant, but at some times things just moved so fast

14 that I did not have time to take notes.

15 I did produce every single note concerning and

16 every single piece of paper concerning the negotiations

17 so -- as had been subpoenaed.

18 **BY MR. JOHNSON:**

19 **Q** And if some specific payment proposal was made

20 to you, you had considered it and responded to it, I take

21 it you had responded to it in correspondence, that

22 correspondence has been produced, has it not?

23 **MR. GRIFFIN:** Objection.

24 **A No.** I would not necessarily have

25 correspondence towards the end. It was all mostly phone

Page 74

1 calls and very few correspondence.

2 **BY MR. JOHNSON:**

3 **Q** Well, now --

4 **A** Faxes back and forth and things like that.

5 **Q** Other than changes in terminology, sir, were

6 there any changes made to the payment modality as

7 reflected in 13.1(b) and 13.2 after the May 26 draft

8 which is before you as part of Exhibit 4, I believe?

9 **A** I couldn't recall. The agreement was signed,

10 what, in June?

11 **Q** Signed June 17.

12 **A** June 17. I could not recall if the final -- if

13 there are final versions there with the same exact

14 wording as 13.1 and 13.2, then I would say no. I

15 couldn't testify positively.

16 **THE COURT REPORTER:** Can I have just minute to

17 change paper?

18 **MR. JOHNSON:** Sure.

19 (Break from 11:40 a.m. to 11:50 a.m.)

20 **BY MR. JOHNSON:**

21 **Q** Let's mark as the next exhibit a series of

22 drafts of the Shriners/Vantage agreement all produced

23 from Shriners records and marked as Exhibit 12A, 12B,

24 12C, 12D, 13A, 13B, 13C, 13F and 14B at Mr. Miller's

25 deposition. Mr. Fleisher can you identify the drafts

Page 75

1 which have been marked as Exhibit 6 as drafts coming from

2 Shriners records?

3 **A** The first one, I could not identify it. I

4 don't see my writing on it. That's 12A, I think. 12B, I

5 can definitely say this is something that I had reviewed

6 because my handwriting is on many portions of it. 12C --

7 12C I can identify because there is a line-out on Page 8

8 and, yeah, there's my handwriting on Page 9, 10 and so

9 forth. So I recognize that one.

10 12D, my handwriting is on Pages 1 and 2, so it

11 would have been something that I reviewed. 13A -- 13A, I

12 can't identify because that handwriting -- the notations

13 on that is not my handwriting. It's someone else's.

14 **Q** Do you recognize whose handwriting it is?

15 **A** No, I don't.

16 **Q** Okay.

17 **A** No. 13B I can identify because the handwriting

18 notes on that are -- those are mine. Yes. Okay. 13C, I

19 cannot tell one way or the other whether this is

20 one -- there's only one mark on that. I can't tell if

21 that's my handwriting or not. It's not handwriting.

22 It's just a line on top of the second page.

23 **Q** I think those -- I think that's part of what

24 you've just looked at. I think the staple --

25 **A** Yeah. All right. This is 13C. I don't

Page 76

1 remember that. This one attached to -- I think it was

2 attached to 13C. I don't know if it's a loan agreement.

3 This may have been the loan agreement that someone

4 was -- what we were talking about previously. 13F is

5 mine. Yeah, I recognize that. That's my memorandum to

6 Mr. Bracewell. 14B, I recognize that because the changes

7 on there were my handwriting.

8 **Q** Okay. Now, are there any other drafts of the

9 agreement other than the ones that you have identified

10 from Exhibit 6 which you have some specific recollection

11 of having considered during the negotiation in

12 preparation of the Shriners/Vantage agreement?

13 **A** If these are all of the ones that were

14 contained in the materials that were furnished to

15 Mr. Griffin, then these would be all of them.

16 **Q** And do they fairly reflect the proposals that

17 were made in the drafts submitted to you during the

18 course of the negotiation?

19 **A** As to the ones that I could identify that I

20 recognize because I had my handwriting on, yes.

21 **Q** Are you aware of any proposals in any other

22 drafts that you -- that were submitted to you and that

23 you considered other than ones appearing in the documents

24 you have identified from Exhibit 6?

25 **A** I couldn't answer that one way or the other.